FILED
United States Court of Appeals
Tenth Circuit

June 14, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TRAVIS CARL CONDRY,

Defendant - Appellant.

No. 22-5058
(D.C. No. 4:21-CR-00322-CVE-1)
(N.D. Okla.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **KELLY**, and **BRISCOE**, Circuit Judges.**

Defendant-Appellant Travis Carl Condry was convicted of aggravated sexual abuse by force in Indian Country, 18 U.S.C. § 2241(a)(1), and was sentenced to 180 months' imprisonment and five years' supervised release. His conviction arose from causing his victim (T.C.) to engage in anal sex by use of force. On appeal, he argues that the district court plainly erred by failing to instruct the jury that a conviction required that he knew that his use of force caused T.C. to engage in a sexual act. We

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument.

have jurisdiction under 28 U.S.C. § 1291 and affirm.

Background

A. Factual History

Mr. Condry and T.C. met while the two worked at a restaurant in 2017. Their relationship turned sexual in 2018 and the two engaged in consensual sexual encounters in August and again in November. III R. 61–64. During their November encounter, the two watched some, if not all, of the movie, Fifty Shades of Grey, which depicts a rough sexual relationship between consenting partners. Id. at 63, 204.

Their third sexual encounter on December 20, 2018, led to Mr. Condry's arrest and eventual conviction. That night, T.C. stopped by Mr. Condry's apartment to deliver a gift. Id. at 65. When she arrived, Mr. Condry was playing video games and had been drinking. Id. at 67–69. Mr. Condry motioned towards her to initiate sexual contact and she performed oral sex on him. Id. at 69–70. Around this time, Mr. Condry took T.C.'s Apple watch and the two made a bet whereby if she could not correctly guess his heart rate, based on the Apple watch's reading, the two would have anal sex. Id. at 70–71. The two then moved into the bedroom where the sexual activities continued. According to T.C., the oral sex made her uncomfortable and she wanted to stop. Id. at 73–74. At some point, Mr. Condry began recording the sexual

encounter on his phone.[1] Id. at 72–73.

Mr. Condry told T.C. that if she did not continue oral sex, they would have anal sex per their "bet." Id. at 73. Mr. Condry then convinced her to engage in anal sex to which she consented. Id. at 74. Once the anal sex began, however, T.C. repeatedly and continuously plead with Mr. Condry to stop; telling him "no," that it hurts, and that she was not kidding. Gov't Exh. 1 at 5:05–10:00. Her pleas occurred over a four to five minute period and from the audio she can also be heard crying and at times screaming out in pain. Id. After that, T.C. testified she was finally able to get out from underneath Mr. Condry after struggling to do so.

Next, T.C. left the apartment and called two friends to tell them she had been raped. III R. at 89. She reported the incident to the police and went to the Tulsa Women's Hospital where she met with a sexual assault nurse examiner who indicated T.C. had suffered an .5cm anal tear and redness in her throat. Id. at 92–93, 142.

The next day, a detective conducted a recorded interview of Mr. Condry at his house. Id. 170. Mr. Condry told the detective he believed the anal sex was consensual. Gov't Exh. 2 at 1:57–2:02; 15:50–16:00. He admitted that he did not stop right away when she told him to stop, and instead only slowed down, but that he did fully stop once she started to cry. Id. at 16:00–15; 17:20–40. He claimed the whole encounter lasted about thirty seconds. Id. at 16:53–55. At trial, the detective

[1] At trial, the government introduced two clips that show T.C. performing oral sex. The third clip was audio only as it appears Mr. Condry put the phone down and it captured the audio of the rape. Aplee. Br. at 4.

said Mr. Condry's account was plainly inconsistent with the audio recording. III R. 172.

At trial, Mr. Condry testified that during the second sexual encounter with T.C. — when they had watched Fifty Shades of Grey — the two discussed entering into a contract like in the movie and that T.C. wanted to reenact role play from the film. Id. at 204–05. Mr. Condry testified that the bet concerning the heart rate was related to this previous conversation concerning a contract. Id. at 207–10. He claimed that he interpreted T.C.'s "no's" as sensual and that when she said "stop" he would stop moving but T.C. would pull him forward or push back into him again. Id. at 210–12, 224–25. Moreover, he testified that he was not able to remove his penis even though he tried because he was frozen most of the time and T.C. had a hold of his thigh. Id. at 225–26, 230–31.

B. Procedural History

Mr. Condry was charged with a violation of 18 U.S.C. § 2241(a)(1) which makes it a crime to "knowingly cause[] another person to engage in a sexual act [causation element] — (1) by using force against that other person [force element]. . . ." 18 U.S.C. § 2241(a)(1) (alterations added); see I R. 10. Without objection, the district court instructed the jury as follows:

> To find defendant guilty of this crime you must be convinced that the United States has proved each of the following beyond a reasonable doubt:
>
> First: Defendant knowingly caused T.C. to engage in a sexual act;
>
> Second: Defendant did so by using force against T.C.;

> Third: Defendant is an Indian; and
>
> Fourth: That the act occurred in the territorial jurisdiction of the United States, that is, within Indian Country in the Northern District of Oklahoma.

I R. 86 (emphasis added).

On appeal, Mr. Condry argues that the force element (second element in the instructions) omitted the knowingly mens rea. According to Mr. Condry, its inclusion was required because whether he knew his use of force, and not her consent, caused the sex is the crucial element separating between innocent and wrongful conduct. Moreover, without this mens rea requirement, he maintains that his primary strategy of asserting a defense of apparent consent — that he did not know T.C. withdrew her consent and as such did not know his force was causing the sex act — was diminished. Given plain error review, he contends that it is at least reasonably probable that the jury would have acquitted him had the jury been properly instructed.

Discussion

Normally, "[w]e review the instructions as a whole de novo to determine whether they accurately informed the jury of the governing law." United States v. Martin, 528 F.3d 746, 752 (10th Cir. 2008) (quoting United States v. Nacchio, 519 F.3d 1140, 1158–59 (10th Cir. 2008), vacated in part on other grounds by United States v. Nacchio, 555 F.3d 1234 (10th Cir. 2009) (en banc)). However, given Mr. Condry's failure to object, we review for plain error instead. To prevail he must

show (1) error, (2) that is plain, (3) that affected his substantial rights, and (4) that had a serious effect on the fairness, integrity, or public reputation of judicial proceedings. United States v. Leib, 57 F.4th 1122, 1128 (10th Cir. 2023). Yet, we apply plain error less rigidly when reviewing an improper instruction on an element of an offense in light of the Sixth Amendment's jury trial guarantee. United States v. Benford, 875 F.3d 1007, 1016–17 (10th Cir. 2017). Nonetheless, "[b]ecause all four requirements must be met, the failure of any one will foreclose relief and the others need not be addressed." United States v. Gantt, 679 F.3d 1240, 1246 (10th Cir. 2012).

1. Error

Mr. Condry argues the jury instructions should have required the jury to find not only that (1) Mr. Condry knowingly caused T.C. to engage in a sex act, but also (2) that he did so by knowingly using force. Mr. Condry argues that we must include the knowingly mens rea in the force element given the "longstanding presumption . . . that Congress intends to require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.'" Rehaif v. United States, 139 S. Ct. 2191, 2195 (2019) (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994)). In his estimation, whether the sex act was accomplished by force is the element that "separate[s] wrongful conduct from 'otherwise innocent conduct.'" Ruan v. United States, 142 S. Ct. 2370, 2377 (2022) (quoting Elonis v. United States, 575 U.S. 723, 736 (2015)); see also X-Citement Video, Inc., 513 U.S. at 68, 72–73, 78 (invoking the presumption of

scienter for all elements in a similarly structured statute).

The government concedes that the presumption of scienter ought to modify the force element. See Aplee. Br. at 16. As best we can tell, the government instead argues that the jury instructions as written adequately conveyed that the jury had to find Mr. Condry knew his use of force caused the sex act. We will assume, without deciding, that the presumption of scienter applies for the force element of § 2241(a), and that the instruction was in error as it should have included knowingly as to the force element. See United States v. A.S., 939 F.3d 1063, 1079 (10th Cir. 2019) ("The government does not dispute that it was required to prove this element, and we thus assume in resolving this case that it was obliged to carry this burden.").

2. Plain Error

Assuming error, it is not plain. An error is plain if it is "clear or obvious under current, well-settled law." United States v. Herrera, 51 F.4th 1226, 1248 (10th Cir. 2022) (quoting United States v. DeChristopher, 695 F.3d 1082, 1091 (10th Cir. 2012)). An error ordinarily can be clear and obvious only if "the Supreme Court or our court has addressed the issue." Id. (quoting United States v. Leal, 32 F.4th 888, 897–98 (10th Cir. 2022)).

Mr. Condry argues that while no court has specifically addressed the issue of scienter for the force element in § 2241(a)(1), Supreme Court cases applying the presumption of scienter to other statutes make plain that this jury instruction was in error. See X-Citement Video, 513 U.S. at 72; Rehaif, 139 S. Ct. at 2195. Mr. Condry posits that this is sufficient because this court has explained "that there need

not be an in-circuit case dealing with the precise . . . issue if there is a case that sets forth a principle clearly generalizable to the subject statute." United States v. Faulkner, 950 F.3d 670, 680 (10th Cir. 2019).

Mr. Condry's contention fails for the simple reason that this court in Martin approved essentially identical jury instructions concerning 18 U.S.C. § 2241(a).[2] Those instructions required a jury to find:

> **First**, that the Defendant . . . caused [Jane Doe] to engage in a sexual act . . . .
> **Second**, that the Defendant . . . acted knowingly in causing [Jane Doe] to engage in that sexual act;
> **Third**, that the Defendant . . . did so by using force against [Jane Doe] . . . .

528 F.3d at 752 (emphasis in original). In Martin, the defendant argued the instructions did not make clear the statute "applies only to non-consensual sex." Id. This court rejected that argument, finding that the interaction of the first and third elements require the government "to prove that force or serious threat—and therefore not the victim's consent—was the cause of the sex act." Id. We concluded, "[t]his is all the proof of non-consent that the statute demands," and the instructions were not erroneous. Id. There is no material difference between the instructions here and in

[2] We also note that other circuits when confronted with instructional issues concerning § 2241(a) have held that nearly identical jury instructions adequately conveyed the law concerning consent, see United States v. Rivera, 43 F.3d 1291, 1298 (9th Cir. 1995) (finding that the causation requirement of § 2241 accounted for defendant's theory that the victim "consensually engaged in intercourse rather than out of fear"), and have not questioned a recitation of the elements of § 2241(a) that excludes a knowingly mens rea for the force element, see United States v. Cobenais, 868 F.3d 731, 736, 739–40 (8th Cir. 2017).

Martin, as the instructions here merely condense the first and second elements in Martin into one element. Mr. Condry here does not allege that the first element — the causation element — was erroneous.

Thus, Martin, which is still precedent, unequivocally stated that when it comes to proof of non-consent, the government need only prove that force caused the act and otherwise approved jury instructions identical in all material respects to those given here. This fact alone is sufficient to dispel any argument that the jury instructions here were plainly erroneous.

To be sure, Martin did not address the precise issue Mr. Condry raises here concerning the force element. However, as discussed, Mr. Condry's argument, while an instructional one, essentially is one of apparent consent. He argues that without a knowingly mens rea modifying the force element, the jury could yet convict him even if he did not know that T.C. revoked consent to their forcible sex. This is so, he argues, because not knowing if force caused the sex is akin to not knowing if consent is revoked. See Aplt. Br. at 7, 10. Notably though, according to Martin, the defense of apparent consent is accounted for in the jury instructions here by the mens rea present in the causation element. 528 F.3d at 753 (stating that "'[a]pparent consent' might be relevant to disproving a defendant's mens rea in some cases, but only by negating knowingness, the second element [embodied in the jury instructions] of the crime, not by negating the causation requirement embodied in the first and third."). This reinforces that the claimed error cannot be plain as the district court would reasonably believe any concerns over knowledge and consent were accounted for in

the instructions given. Lastly, Martin was decided after X-Citement Video, which is the crucial Supreme Court case Mr. Condry relies on to show plain error, thus diluting the obviousness of any instructional error.

Moreover, newer Supreme Court precedent such as Ruan and Rehaif does not obviously render reliance on Martin inapposite. Accentuating this point is this court's decision in A.S. and United States v. Freeman, — F.4th —, 2023 WL 3910444 (10th Cir. 2023). Both cases concerned jury instructions for a violation of 18 U.S.C. § 2242(2), which punishes an individual who "knowingly . . . engages in a sexual act with another person if that other person is — (A) incapable of appraising the nature of the conduct; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act." Much like in this case, the court in both those cases noted that the Tenth Circuit has yet to address whether the knowingly mens rea, while modifying "engaging in a sexual act," also modifies later subsections (A) and (B), thereby requiring the government to prove the defendant knew the victim was incapacitated. A.S., 939 F.3d at 1079 n.6; Freeman, — F.4th, 2023 WL 3910444 at *10 n.12. Both panels left the answer to that question for another day and merely assumed knowingly modified subsection (A) and (B) because the government did not dispute it. A.S., 939 F.3d at 1079 n.6; Freeman, — F.4th, 2023 WL 3910444 at *10 n.12. This reveals both that the implications of Ruan, Rehaif, and X-Citement Video are far from settled and that whether the knowingly mens rea in § 2241(a) also modifies the later mentioned force element is an unanswered question that lacks an obvious answer in this circuit.

3. Effect on substantial rights

Even were we to assume error that was plain, to prevail on the third step Mr. Condry must still show that there is "a reasonable probability that, but for the error claimed, the result of the proceeding would have been different." United States v. Gonzalez-Huerta, 403 F.3d 727, 733 (10th Cir. 2005) (en banc) (quoting United States v. Dominguez Benitez, 542 U.S. 74, 82 (2004)). No such probability exists here.

Mr. Condry contends that a proper instruction could have reasonably led to a different result because while the evidence was strong that T.C. in fact withdrew her consent, evidence Mr. Condry knew she withdrew her consent was weaker. As such, he argues a jury could still reasonably find that he did not know she had withdrawn her consent and thus did not know his force was causing the sex. For support, he points out that he has consistently maintained he believed the sex was consensual because (1) the two discussed role playing based on Fifty Shades of Grey; (2) T.C. said the anal sex would hurt when she initially consented; and (3) he was confused by her reaction and whether it was part of the role playing. III R. 209–10.

The government counters that the crux of Mr. Condry's defense at trial was not that he did not knowingly use force but rather he denied using force altogether. In his testimony, he claimed he stopped whenever she said stop and would only resume because T.C. pulled him back in by grabbing his thigh. Id. 210. Further, he stated he was frozen and never had his arm on her or held her down in any way. Id. 231. The jury obviously discredited this testimony and found he did indeed use force. And as

the Eighth Circuit noted, "[i]t will . . . be a rare case indeed where the defense of reasonable mistake will be available, since the need to employ force will necessarily indicate, as a general matter, a lack of consent." Cobenais, 868 F.3d at 740 (emphasis in original) (quoting United States v. Norquay, 987 F.2d 475, 478 (8th Cir. 1993), abrogated on other grounds by United States v. Thomas, 20 F.3d 817 (8th Cir. 1994) (en banc)). Thus, the jury found he did use force and there is little in the record that would reasonably call into question whether he did so knowingly. Indeed, this is not the "rare case" where a jury would find Mr. Condry was reasonably mistaken as to consent. His testimony concerning vague allusions to a contract like in Fifty Shades of Grey and that T.C. stated anal sex would hurt does not alter that conclusion.

Most importantly, the government's case concerning a knowing use of force was particularly strong as it was squarely supported by the audio recording of the rape. As Mr. Condry himself states, "if a defendant does not know that his partner revoked consent, then he does not know that his use of force is causing the sex act." Aplt. Reply Br. at 7. Of course, the inverse must be true in that if a defendant does know his partner has revoked, then he must know his use of force is causing the sex act. And here, circumstantial evidence of his knowledge concerning her revocation was overwhelming given the audio recording. Thus, the recording effectively undermines Mr. Condry's argument concerning reasonable mistake, and, in turn, powerfully supports a finding of his knowing use of force.

Given we find the error was neither plain nor affected Defendant's substantial

rights, we need not reach the fourth element of plain error review.

AFFIRMED.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge